(69519) SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

—against—

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioners of Election, constituting the Board of Elections in the City of New York,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

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Petitioners seek a judgment declaring that Chapters 987 and 152 §4 of the New York Laws of 1968 are unconstitutional upon various grounds. Chapter 987, which became

law on June 22, 1968, provides, in part, for the creation of twenty-five additional judges in the Civil Court of the City of New York; apportions the positions among the five counties within the City and further provides for the election of the candidates for such positions by the electors of the respective counties of such City (§14). It is explicitly provided that the Act shall take effect on June 1, 1968; that the additional Civil Court judges provided for therein shall be elected at the general election held in the month of November, 1968 and that they shall take office on January 1, 1969.

Chapter 152 §4 provides that vacancies occurring in the office of judge of the Civil Court at the end of 1968 shall be filled by judges "chosen by the electors of the county or district from which the judge whose term expires * * *, or his predecessor was elected or appointed."

The sole relief sought against the respondents, the City Clerk and Board of Elections of the City of New York is that temporary and permanent injunctions issue enjoining the City Clerk "from certifying to the Board of Elections * * * that 25 offices of additional judges of the Civil Court * * * are to be filled in the general election to be held in November, 1968" and that the Board of Elections be enjoined "from accepting, filing or acting upon any such certification or any certificates of party nomination or independent nominating petitions for such purported public offices * * * and from placing the names of the candidates therefor on the official ballot to be used at the general election in 1968." (Complaint, pp. 40-41).

Decisions in Courts Below

The Court of Appeals of the State of New York unanimously affirmed (22 N Y 2d 903, October 8, 1968), an order of the Appellate Division of the Supreme Court in the First Judicial Department (30 A D 2d 432, September 19, 1968), which, in turn, unanimously affirmed an order of the Supreme Court, New York County, entered August 29, 1968, which denied an application by petitioners for a temporary injunction and dismissed the complaint.

ARGUMENT

While it appears that there is no substantial federal question presented, the duties of respondents in the preparation of ballots are purely ministerial under New York Election Law.

(1)

The duties of the respondents, City Clerk and Board of Elections are clearly defined by statute with respect to the preparation of ballots for public offices to be filled by the electors within the City of New York. New York Election Law §§67 and 103. Such duties are purely ministerial in nature.

The specific duties of the respondent City Clerk are prescribed by Election Law §67 which provides, in part:

> "The secretary of state shall, at least three months before each general election make and transmit to the board of elections of each county, and of the city of New York, a certificate stating each officer, except county, city, village and town officers, and including

senators and members of assembly who lawfully may be voted for at such election by the voters of the county or of such city, or any part thereof. Each county, *city,* village and town *clerk shall within the same time make and transmit to the board of elections a certificate stating each* county, *city,* village or town officer, respectively, not including senators or members of assembly, to be voted for at such election. If any such officer is to be elected to fill a vacancy, the certificate shall so state. * * * " (Emphasis supplied.)

The duties of respondent Board of Elections with respect to the conduct of elections for public office in the City of New York are mandated by the Election Law. Section 103 thereof, provides in part:

"§103 Placing names upon ballot

If * * * certificates of designation or nomination are in compliance with this chapter, the names of the candidates thereby designated or nominated *shall* be printed upon the appropriate official ballot; * * *." (Emphasis supplied.)

(2)

Upon the effective date of Chapter 987 of the Laws of 1968, in June, 1968, twenty-five vacancies immediately existed for the office of judge in the Civil Court of the City of New York in accordance with the provisions of New York Public Officers Law §30, subd. 2, which provides:

"2. When a new or an additional office shall be created, such office shall for the purposes of an appointment or election be vacant from the date of its

creation, until it shall be filled by election or appointment."

Thereafter, it became incumbent upon respondents, City Clerk and Board of Elections to perform their respective ministerial duties as prescribed by the Election Law, *supra.*

(3)

The Attorney General of the State of New York intervened in this action pursuant to New York Executive Law §71 for the purpose of upholding the constitutionality of the challenged Laws of 1968.

While, as pointed out, the functions of the respondents are purely ministerial, they join with the Attorney General in his arguments which demonstrate the obvious constitutionality of the challenged statutes.

CONCLUSION

The application for a writ of certiorari should be denied.

February 26, 1969.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel of
The City of New York,
Attorney for Respondents.

Robert E. Hugh,
of Counsel.